APPENDIX

Opinion

(Filed Nov. 20, 1959)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

L. A. 25485

HAROLD L. COSPER, *Plaintiff and Appellant,*

v.

SMITH & WESSON ARMS CO. (a Corporation), E. MORTON PITT, ET AL., *Defendants,*

SMITH & WESSON, INC., *Respondent.*

Plaintiff, a police officer, brought this action for personal injuries allegedly sustained in this state when the cylinder of a revolver, purchased by him in this state from defendant Pitt and manufactured by Smith & Wesson, Inc., a Massachusetts corporation, "exploded and blew apart" during target practice, causing the permanent loss of vision of plaintiff's right eye. Summons and complaint were served on Walker K. Lookabaugh as the alleged agent, sales manager and manufacturer's representative for Smith & Wesson. The service was in pursuance of section 6500 of the Corporations Code: "Delivery by hand of a copy of any process against a foreign corporation (a) to . . . the general manager in this State . . . shall constitute valid service on the corporation."

Smith & Wesson specially appeared and moved to quash the service upon the ground that it was not "doing business" in this state and maintained no agent here upon whom process might be served. The motion was heard upon affidavits, including certain depositions considered as such affidavits. The court found that Lookabaugh was neither "an officer," the "general manager" in this state

nor the "designated agent" of Smith & Wesson "for service of process in California"; and that Smith & Wesson was "not doing business in California in the sense required to make it amenable to process" here. From the order thereupon entered quashing the service on Smith & Wesson, plaintiff appeals.

Plaintiff claims that the admitted activities of Smith & Wesson in this state establish that it was "doing business" here so as to be amenable to the service of process, and that proper service was effected upon it by serving Lookabaugh. He further contends that the court's contrary findings are not supported by the evidence but constitute only erroneous conclusions of law. The single affidavit filed in support of Smith & Wesson's motion to quash service was that of its president. Despite the document's conclusionary averments, the facts that it recites disclose that Smith & Wesson had sufficient contacts with this state to render it amenable to such service of process.

This affidavit recites that Smith & Wesson, Inc., is a Massachusetts corporation with offices in Springfield and is not qualified to do business in this state; that it "has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints against [it] in California"; that it has no offices nor any property or assets in this state; that it "does not solicit retail business, but distributes its products F.O.B. Springfield through regular wholesale and dealer channels. Sales promotions are principally conducted by long established firms known as manufacturer's representatives, which on their own time and expense solicit business in several allied lines against an overriding discount, or commission, on business initiated by them"; that the "Walter Lookabaugh Co. of California and its predecessor, the Paul S. Linforth Co., have been known to us as general manufacturer's representatives specializing in the sporting goods field"; that there is no contract with Lookabaugh Co. except that they were "to

promote on a non-exclusive basis the sale of our products on the West coast against a straight commission of 5%"; that Smith & Wesson, Inc., has no financial interest in the Lookabaugh Co. nor any control over this company or its employees; that Lookabaugh Co. buys its own samples and "no help or assistance is given them by Smith & Wesson, Inc., except such advertising material as is furnished by Smith & Wesson, Inc., to the general jobbing trade throughout the world."

This affidavit discloses that Smith & Wesson's products are distributed in California; that Lookabaugh Co., a manufacturer's representative, promoted its business here though not on an exclusive basis, and distributed general advertising matter furnished by Smith & Wesson. It therefore appears that the material factual averments of defendant's affidavit do not contradict but rather coincide with plaintiff's extended showing of Smith & Wesson's activities in this state through its agreement with Lookabaugh for servicing dealer accounts, investigating and recommending prospective dealers to Smith & Wesson, arranging publicity, distributing advertising, and handling and reporting on complaints concerning defects in Smith & Wesson's products. In short, this is not a true case of conflicting evidence in which a reviewing court will refuse to disturb findings based thereon. (Griffith Co. v. San Diego Col. for Women, 45 Cal. 2d 501, 507-508; Murray v. Superior Court, 44 Cal. 2d 611, 619; Fuller v. Lindenbaum, 29 Cal. App. 2d 227, 230.)

Reference has been hereinabove made to plaintiff's "extended showing" of Smith & Wesson's activities in this state. This showing was made largely through the depositions of several witnesses. On the hearing of the motion, Smith & Wesson objected to the offer of these depositions upon the ground that it had not been served with notice of the taking of said depositions. The trial court's memorandum opinion shows that it treated said depositions "as affidavits, despite the circumstances under which they were

obtained," and that it "read and considered all sworn evidentiary statements before it." The originals of all depositions considered by the trial court have been forwarded to this court. Smith & Wesson still objects to the consideration of said depositions and contends that without the aid thereof, plaintiff failed to sustain his burden of proof. In our opinion, said depositions were properly before the trial court, and are properly before this court, like all other ex parte affidavits which were used by the parties in support of, or in opposition to, the motion. (Code Civ. Proc., § 2009.) Furthermore, as above indicated, the material portions of said depositions merely describe in greater detail the admitted activities of Smith & Wesson in this state as shown by the affidavit of its president, and there is therefore no real conflict in the material factual averments.

The validity of the service of process pursuant to section 6500 of the Corporations Code depends first on whether the foreign corporation is "doing business in this State" within the meaning of the statute. (Code Civ. Proc., § 411, subd. 2.) As this court said in Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, at page 858: "That term is a descriptive one that the courts have equated with such minimum contacts with the state 'that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 [66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057].) Whatever limitation it imposes is equivalent to that of the due process clause." In essence, the statutory term "is synonymous with the power of the state to subject foreign corporations to local process." (Eclipse Fuel etc. Co. v. Superior Court, 148 Cal. App. 2d 736, 738; see also Carl F. W. Borgward, G.M.B.H., v. Superior Court, 51 Cal. 2d 72, 75; Gordon Armstrong Co. v. Superior Court, 160 Cal. App. 2d 211, 218.)

From the record it indisputably appears that Smith & Wesson had a continuing arrangement for the distribution and sale of its products throughout this state. Said defendant had retained a manufacturer's representative, Lookabaugh, for the promotion of sales for the servicing of dealer accounts, and for the distribution of advertising material which defendant furnished in furtherance of its selling activity. Such a regular course of business dealings in sales promotion within the state is similar to the regular purchasing activities of the foreign corporation in the Jahn case and the regular selling activities of the foreign corporation in the Borgward case. Though self-employed as a manufacturer's representative, Lookabaugh was performing much the same type of substantial selling services for Smith & Wesson through a course of regularly established and systematic business activity as were deemed in Gray v. Montgomery Ward, Inc., 155 Cal. App. 2d 55, to constitute "doing business" in the state by the foreign corporation there involved. These services may reasonably be said to have given Smith & Wesson "in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force." (Sales Affiliates, Inc. v. Superior Court, 96 Cal. App. 2d 134, 136.) Certainly, the admitted activities of Smith & Wesson in this state are more significant than the minimal contacts deemed sufficient in McGee v. International Life Insurance Company, 355 U.S. 220, where the foreign corporation elected to deal with its insured, a California resident, only by mail.

It further appears that the gun which exploded was sold in this state, the accident occurred in this state, the plaintiff is a resident of this state, and many of the witnesses who will probably be called at the trial are present in this state. Therefore, in view of all the facts, we deem it not inconsistent with "traditional notions of fair play and substantial justice" to subject the defendant Smith

& Wesson to the jurisdiction of the courts of this state in this action.

The second consideration in testing the validity of service under section 6500 of the Corporations Code is whether the person served is within the statutory designation—here "the general manager in this State" for Smith & Wesson. In this regard, it has been said that "every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made," and by service on such an agent, "the requirement of the statute is answered." (Eclipse Fuel etc. Co. v. Superior Court, supra, 148 Cal. App. 2d 736, 746.) Whether in any given case, the person served may properly be regarded as within the concept of the statute depends on the particular facts involved. (Ibid; Millbank v. Standard Motor Const. Co., 132 Cal. App. 67, 71; Roehl v. The Texas Co., 107 Cal. App. 691, 704.) Here, it reasonably appears that Lookabaugh, as a manufacturer's representative actively engaged in promoting the sales of Smith & Wesson and earning commissions through such sales, would have ample regular contact with Smith & Wesson and would be of "sufficient character and rank to make it reasonably certain" that Smith & Wesson would be apprised of the service of process. Neither the fact that Lookabaugh's organization was designated as "manufacturer's representatives" nor the fact that such representatives promoted sales "on their own time and expense" is determinative here. Whether Smith & Wesson was operating "through an independent contract, agent, employee or in any other manner" (Gray v. Montgomery Ward, Inc., supra, 155 Cal. App. 2d 55, 58; Fielding v. Superior Court, 111 Cal. App. 2d 490, 494; see also Eclipse Fuel etc. Co. v. Superior Court, supra, 148 Cal. App. 2d 736, 740), the essential factor is that Lookabaugh in his selling and advertising activities was performing services for Smith & Wesson and providing it with the opportunity for "regular contact with its cus-

tomers and a channel for a continuous flow of business into the state." (Sales Affiliates, Inc. v. Superior Court, supra, 96 Cal. App. 2d 134, 136.) In short, the arrangement of Smith & Wesson with Lookabaugh appears, in the light of the president's affidavit, to have given Smith & Wesson substantially the business advantages that it would have enjoyed "if it conducted its business through its own offices or paid agents in the state" (Eclipse Fuel etc. Co. v. Superior Court, supra, 148 Cal. App. 2d 736, 740); and such arrangement was sufficient to constitute Lookabaugh "the general manager in this State" for purposes of service of process on Smith & Wesson. (Corp. Code, § 6500.)

It is true that Smith & Wesson has been held to be immune from the service of process in this state. (Smith & Wesson, Inc. v. Municipal Court, 136 Cal. App. 2d 673.) That ruling was based on a lack of competent evidence showing that Smith & Wesson was "doing business" within this state, but it was expressly recognized that "additional evidence" might show otherwise. (P. 679.) A manufacturer of arms whose products are sold on a wide scale throughout the state through the extensive, regular and continuous services of a "manufacturer's representative" should not be perpetually immune from the service of process in actions brought by residents of this state because of injury sustained from alleged defects in the manufacturer's products. In the present case, there are additional competent and uncontradicted factual averments showing that under the "minimum contacts" doctrine Smith & Wesson is "doing business" within this state, and that its representative Lookabaugh comes within the statutory concept of its "general manager in this State" for the purposes of service of process. (Corp. Code, § 6500.) In such circumstances, "the fair and orderly administration of the laws" (International Shoe Co. v. Washington, 326 U.S. 310, 319) fully justifies subjecting Smith & Wesson to the jurisdiction of our courts.

The order granting the motion to quash service of summons and complaint is reversed.

SPENCE, *J.*

WE CONCUR:

GIBSON, *C. J.*
TRAYNOR, *J.*
SCHAUER, *J.*
PETERS, *J.*
WHITE, *J.*

Dissenting Opinion

I dissent. I would affirm the order for the reasons stated by Mr. Justice Mussell in the opinion prepared by him for the District Court of Appeal in Cosper v. Smith & Wesson, 170 A.C.A. 244, 338 P. 2d 596.

McCOMB, *J.*

(Dist. Court of Appeal—Fourth Dist. Filed May 6, 1959)

IN THE DISTRICT COURT OF APPEAL
FOURTH APPELLATE DISTRICT
STATE OF CALIFORNIA

4th Civil No. 5677

HAROLD L. COSPER, *Plaintiff and Appellant,*

v.

SMITH & WESSON ARMS CO., a corporation, et al.,
Defendants.

SMITH & WESSON, INC., *Respondent.*

Opinion

APPEAL from an order of the Superior Court of Kern County granting a motion to quash service of summons. Norman F. Main, Judge.

Affirmed.

Morris B. Chain and Milton M. Younger for Appellant.

Borton, Petrini, Conron & Brown for Respondent.

This is an action for personal injuries alleged to have been sustained by plaintiff when the cylinder of a revolver, purchased by him from defendant F. Morton Pitt and manufactured by Smith & Wesson, Inc., a Massachusetts corporation, "exploded and blew apart", causing the permanent loss of vision in plaintiff's right eye.

Service of summons and complaint on Smith & Wesson, Inc., was attempted to be made by serving Walter K. Lookabaugh as the alleged agent, sales manager and manufacturer's representative for Smith & Wesson Arms Company in California. Special appearance on motion to quash service was made by Smith & Wesson, Inc., supported by the affidavit of Carl L. Hellstrom, president of said company. The motion was heard on this affidavit and on counter affidavits filed by plaintiff. The trial court granted the motion to quash service of summons and plaintiff appeals from the order granting it, claiming that Smith & Wesson, Inc., was "doing business" in the state of California and that proper service upon Smith & Wesson, Inc., was effected by service upon Walter K. Lookabaugh. These issues were tried on affidavits and involved issues of fact.

In Griffith Co. v. San Diego Col. for Women, 45 Cal. 2d 501, 507, 508, the court said:

> "'An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive. This

rule is equally applicable whether the evidence is oral or documentary.'"

In Fuller v. Lindenbaum, 29 Cal. App. 2d 227, 230, on an appeal from an order granting a motion to quash service of summons, the court said:

> "Furthermore, in the consideration of an appeal from an order made upon affidavits involving the decision of a question of fact, an appellate court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established. (Citations.)"

In Murray v. Superior Court, 44 Cal. 2d 611, 619, it is said that an appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated; that when the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify; that so far as it has passed on the weight of the evidence, its implied findings are conclusive; and that this rule is equally applicable whether the evidence is oral or documentary.

The affidavit of Carl R. Hellstrom, president of Smith & Wesson, Inc., filed in support of the motion to quash, is as follows:

> "I, Carl R. Hellstrom, President of Smith & Wesson, Inc. on oath depose and say:
>
> "That Smith & Wesson, Inc. is a Massachusetts Corporation with its offices and manufacturing facilities in Springfield, Massachusetts.
>
> "That Smith & Wesson, Inc. is not qualified to do business in California, and has not filed an application to

do business in California, and has not requested the Secretary of State, or other lawful authority, to do business in California.

"That Smith & Wesson, Inc. has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints against Smith & Wesson, Inc. in California.

"That Smith & Wesson, Inc. has never had, nor does it now have offices in California, nor has it held any sales conventions in California.

"That Smith & Wesson, Inc. has no property, inventory or assets in California.

"That Smith & Wesson, Inc. does not solicit retail business, but distributes its products F.O.B. Springfield through regular wholesale and dealer channels. Sales promotions are principally conducted by long established firms known as manufacturer's representatives, which on their own time and expense solicit business in several allied lines against an over-riding discount, or commission, on business initiated by them.

"That the Walter Lookabaugh Co. of California and its predecessor, the Paul S. Linforth Co., have been known to us as general manufacturer's representatives specializing in the sporting goods field.

"That Smith & Wesson, Inc. has never had, nor does it now have, any contract or agreement with them except that they were, in common with their other lines, to promote on a non-exclusive basis the sale of our products on the west coast against a straight commission of 5%.

"That Smith & Wesson, Inc. does not now have, nor has it ever had, any financial interest in the Lookabaugh Co. or its predecessors, and that Smith &

Wesson, Inc. does not have any control or jurisdiction of the Walter Lookabaugh Co. or its employees.

"That the Walter Lookabaugh Co. buys its own samples and that no help or assistance is given them by Smith & Wesson, Inc., except such advertising material as is furnished by Smith & Wesson, Inc. to the general jobbing trade throughout the world.

s/ CARL R. HELLSTROM

"Then appeared personally, Carl R. Hellstrom, President of Smith & Wesson, Inc., and swore that the above recited facts are true and correct to the best of his knowledge and belief.

s/ VERA G. ROCKSTROH"

In opposition to the motion appellant filed the affidavit of counsel for appellant in which he stated that on May 7, 1957, he took the deposition of Walter K. Lookabaugh in which Lookabaugh made certain statements relative to his business transactions with Smith & Wesson, Inc. This deposition was not signed or filed with the trial court and the court ruled that it was not admissible. Moreover, the statements in the affidavit of counsel alleged to have been made by Lookabaugh are clearly hearsay and of no probative value. Other statements of counsel in his affidavit are made on information and belief.

In the affidavit of Lynn A. White, deputy chief of police in Los Angeles, filed in opposition to the motion, affiant states that in 1956 he wrote to Smith & Wesson, Inc., asking that a representative of the company be sent to call upon them to discuss alleged structural weaknesses of Smith & Wesson firearms and that Lookabaugh called upon him and stated that he was a representative of the company and had come to discuss complaints.

Depositions of Hannah A. Giegerich, Frank W. Symonds and Harold O. Austin were offered by appellant. Objection to these depositions and motions to suppress them were made by Smith & Wesson, Inc., and the trial court ruled that they were not admissible as depositions since they were taken without notice. However, the court evidently considered them as affidavits. These alleged depositions or affidavits are not made a part of the record before us and while they might result in a conflict in the evidence, the facts stated in the affidavit of Carl Hellstrom, president of Smith & Wesson, Inc., substantially support the trial court's conclusions that

> "1) Walter Lookabaugh is not (a) an officer of defendant Smith and Wesson, Inc., nor (b) 'the general manager in this state' of said defendant, nor (c) the designated agent of said defendant for service of process in California;
>
> "2) That defendant Smith and Wesson, Inc., is not doing business in California in the sense required to make it amenable to process there."

In Gordon Armstrong Co. v. Superior Court, 160 Cal. App. 2d 211, 217, the court, in discussing the concept of "doing business" which will subject a foreign corporation to local process, quoted the following from Jeter v. Austin Trailer Equipment Co., 122 Cal. App. 2d 376, 388:

> "'By way of recapitulation of the current state of the law under the evolving concept of the "doing business" requirement, it is deducible from the cases that the essentials of due process are fully met, at least for the purposes of amenability to local process and jurisdiction, if a foreign corporation maintains substantial contacts with a state through a course of regularly established and systematic business activity, as distinguished from casual, isolated, or insubstantial contacts or transactions. The court must be astute to weigh

the facts of the individual case to determine whether the particular type of activity in, relation to, or nexus with, the forum is of such substance as will make it just and equitable to conclude that a corporation is "doing business" in the sense required by the purpose at hand.' "

In West Publishing Co. v. Superior Court, 20 Cal. 2d 720, 727, it is said:

" 'A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state the process will be valid only if served upon some authorized agent.' The determination of this jurisdictional question 'is often a matter of great difficulty and extreme nicety. No all-embracing rule as to what is doing business has been laid down.' "

In the instant case the affidavit of the president of Smith & Wesson, Inc., establishes on appeal not only the facts stated therein but all facts which reasonably may be inferred therefrom. It appears from said affidavit that Smith & Wesson, Inc., is a Massachusetts corporation with its offices and manufacturing facilities in Springfield, Massachusetts; that it is not qualified to do business in California; that it has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints for the company; that it has no offices in California and has no property inventory or assets in California; that it does not solicit retail business but distributes its products f.o.b. Springfield through regular and dealer channels; that sales promotions are principally conducted by firms known as manufacturers' representatives, which on their own time and at their own expense solicit business in several

allied lines against an overriding discount or commission on business initiated by them; that the company has never had a contract or agreement with the Lookabaugh Company, except that they were, in common with other lines, to promote on a nonexclusive basis the sale of Smith & Wesson products on the west coast against a straight commission of five per cent; that Lookabaugh Company buys its own samples and that no help or assistance is given them by Smith & Wesson except such advertising material as is furnished by Smith & Wesson to the general jobbing trade throughout the world.

Accepting the foregoing facts stated in said affidavit as true, and the facts which reasonably may be inferred therefrom, we can not say as a matter of law that Smith & Wesson, Inc., was "doing business" in California under the rules announced in the foregoing decisions.

As is said in Jeter v. Austin Trailer Equipment Co., supra, 122 Cal. App. 2d 376, 381: "Whether a corporation is doing business in a state in the sense required by a process statute is peculiarly dependent upon the facts of the particular case." And in Confidential, Inc. v. Superior Court, 157 Cal. App. 2d 75, 79, it was held that "The burden rests upon a plaintiff who has served process upon a foreign corporation to establish that it was doing business in the state at the time of service, or had other sufficient contacts with its people or affairs to warrant the inference that it had subjected itself to the state's jurisdiction. (Citations.)"

The implied finding of the trial court that plaintiff failed to establish that Smith & Wesson, Inc., was doing business in the state of California is supported by the record before us. The purported service was not made on the secretary of state as provided for in Corporations Code, section 6501, nor was a preliminary order under said section obtained. Service was attempted under section 6500 of the Corporations Code, which provides for service of process on a

foreign corporation by delivery by hand of process to "(a) to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the *general manager in this State*, or if the corporation be a bank to a cashier or an assistant cashier, . . ." (Italics added.) Appellant's contention is that Walter K. Lookabaugh is the general manager of Smith & Wesson, Inc., in this state. The burden of proving that Lookabaugh was the authorized agent or general manager of said corporation in this state was upon plaintiff. In this connection, it appears from the affidavit of Carl H. Hellstrom that Smith & Wesson, Inc., has no agents, salesmen or other employees residing in California and there is no evidence that Lookabaugh was or is the general manager of said corporation. On appeal we are required to accept the statement of Hellstrom as true. (Fuller v. Lindenbaum, supra, 29 Cal. App. 2d 227, 228.) In West Publishing Co. v. Superior Court, supra, 20 Cal. 2d 720, 727, it is held that even if a foreign corporation is doing business in this state the process will be valid only if served upon some authorized agent. The same rule is recognized in Jeter v. Austin Trailer Equipment Co., supra, where the court said, at page 388:

> "A foreign corporation may be doing business in a state through the instrumentality of independent contractors located therein, yet those persons through whom its local business is conducted may not be so bound to the foreign corporation as to make them agents capable of receiving process on behalf of the corporation (Citation.)" .

In Smith & Wesson, Inc. v. Municipal Court, 136 Cal. App. 2d 673, an attempt was made to support the agency of Lookabaugh by the statements of Lookabaugh to an investigator that he was a sales representative of the corporation and had an office in San Francisco. It was there held that the statements of Lookabaugh were not

admissible to prove that he was an agent of the company. It was further held that the facts adduced at the hearing of the motion to quash service of summons and complaint were not sufficient to make Smith & Wesson, Inc., amenable to process of the courts of this state.

Appellant relies heavily on Gray v. Montgomery Ward, Inc., 155 Cal. App. 2d 55, also decided by this court. In that case defendant Duro-Metal Products Company filed a special appearance and motion to set aside service of summons and complaint on the ground that the corporation was not doing business in California. The matter was heard on affidavits and the affidavit of E. Bellezzo, the manufacturer's agent handling Duro-Metal products in California, showed that he was the manufacturer's agent in California; that he called upon dealers and prospective dealers in California and new dealers were appointed upon his recommendation; that he checked proposed dealers credit, type of distribution and type of salesmen employed. He testified that once a dealer for Duro was appointed he called upon him urging him to stock with and promote sales of Duro-Metal products; that he occasionally delivered catalogues and brochures furnished by Duro-Metal Products to dealers and was under the supervision of a sales manager who maintained an office in Illinois; that he received a commission on orders delivered to him personally and on others mailed directly to the company. Under the circumstances, it was held that Duro-Metal was doing business through him. The factual situation in that case differs materially from that in the case before us and the opinion is not inconsistent with what we have heretofore said herein.

The record shows that on July 14, 1958, appellant filed an application herein to produce additional evidence, including the deposition of Walter K. Lookabaugh. The application was denied by order of this court on August 27, 1958. Appellant, at the oral argument on appeal herein, made a motion that we reconsider the previous ruling on

the application. The deposition of Walter K. Lookabaugh was lodged with the court and, while it was not received as additional evidence, we have read and considered it. The motion to reconsider is denied.

The order granting the motion to quash summons and complaint is affirmed.

MUSSELL
J.

WE CONCUR:

GRIFFIN
P. J.

SHEPARD
J.

No. 68898

COSPER

v.

SMITH AND WESSON.

Memorandum of Ruling on Motion to Quash

The documents filed in this case as "depositions" of Austin, Symonds and Giegerich are not admissible as such against defendant Smith and Wesson, Inc., since they were taken without notice to said defendant. The same will be true of the deposition of Lookabaugh, if and when filed, it having been taken before the time of purported service on Smith and Wesson by delivery of process to Lookabaugh, and without notice to Smith and Wesson.

However since these "depositions" do constitute statements of these witnesses under oath, it does not necessarily follow that the court in ruling on the motion to quash now before it may ignore their character as affidavits, despite the circumstances under which they were obtained.

The court has also before it affidavits of Morris B. Chain re Lookabaugh's statements on deposition, and the affidavits of Lynn White and Carl R. Hellstrom. Mr. Hellstrom is president of defendant Smith and Wesson, the moving party on the motion to quash.

Mr. Chain's affidavit is probably not admissible for any purpose (*Smith and Wesson* v. *Municipal Court*, 136 CA 2d 673, 679); and like objections have been made to the several "depositions".

The file reflects that plaintiff properly served notice of a motion to take the deposition of Mr. Hellstrom in Massachusetts, obtained an order to that effect and had the commission issued, but never took the deposition of this witness.

Instead, through inadvertence of this court, plaintiff obtained a new commission to take the depositions in Massachusetts of two other and different witnesses, also employees of defendant Smith and Wesson. Plaintiff did not serve on defendant Smith and Wesson any notice of his application for the new commission, nor of the time and place of taking the depositions of these two witnesses, Austin and Symonds. However the "depositions" were taken, and are now offered by plaintiff as affidavits in opposition to the motion to quash. Likewise the deposition of Giegerich was taken without notice to Smith and Wesson, and is now offered.

The court has now read and considered all sworn evidentiary statements before it, and concludes therefrom that by a preponderance of the admissible evidence before it

1) Walter Lookabaugh is not (a) an officer of defendant Smith and Wesson, Inc., nor (b) "the general manager in this state" of said defendant, nor (c) the designated agent of said defendant for service of process in California;

2) That defendant Smith and Wesson, Inc., is not doing business in California in the sense required to make it amenable to process there.

The motion to quash service of summons on defendant Smith and Wesson, Inc., is granted.

MAIN
Judge

Dated: January 21, 1958

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

No. 68898

HAROLD L. COSPER, *Plaintiff*

v.

SMITH & WESSON, INC., E. MORRIS PITT, et al., *Defendants*

Good cause appearing therefor, it is hereby ordered that the Defendant Smith & Wesson, Inc. may have to and including the 13th day of March, 1960 within which to appear, plead or otherwise move in the above entitled and numbered action.

Dated January 13, 1960.

s/ ROBERT B. LAMBERT
Judge